No. 87-1555

In The Supreme Court of the United States

OCTOBER TERM, 1988

JAMES H. BURNLEY IV, SECRETARY, DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS,

v.

RAILWAY LABOR EXECUTIVES ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

BRIEF FOR AIRCRAFT OWNERS & PILOTS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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This amicus curiae is submitted in support of respondents, Railway Labor Executives, et al. By letters filed with the Clerk of the Court, both petitioners and respondents, through their respective counsel of record, have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

The Aircraft Owners & Pilots Association (AOPA) comprises more than 270,000 pilots, aircraft owners, and aviation professionals worldwide. For more than 50 years the AOPA

has been the world's largest organization dedicated to the promotion, development, and responsible self-regulation of civil aeronautics.

Aware of its significant role in deterring the use of aircraft in illegal activities, AOPA has continuously supported and participated in federal, state and local efforts to interdict the smuggling and abuse of illicit narcotics. However, AOPA is keenly aware of the need, as so wisely observed by Justice Brennan, to safeguard our most deeply cherished, fundamental constitutional rights against the potential expedience posed "by consulting the momentary vision of the social good." *New Jersey v. T.L.O.*, 469 U.S. 325, 371 (1985) (Brennan, J., dissenting).

On March 14, 1988, the Federal Aviation Administration (FAA) promulgated a Notice of Proposed Rulemaking (NPRM) proposing the adoption of a sweeping "Anti-drug Program for Personnel Engaged in Specified Aviation Activities." (See, 53 Fed. Reg. 8368).[1]

The Anti-drug testing program proposed by the FAA's NPRM bears close resemblance to the FRA regulations on review before this Court.[2] However, the NPRM would go considerably further in requiring employer-administered-drug testing than the FRA regulations. The NPRM would mandate not only post-accident and "reasonable suspicion" testing, but randomized testing of all employees without any

1. An excerpt from the Federal Register, Volume 53, No. 49, March 14, 1988, containing the NPRM at page 8368 has been lodged with the Clerk of the Court.

2. The NPRM would require each employer of virtually every commercially-related domestic aviation activity to adopt a mandatory drug testing program for the testing of each of his/its employees. The mandatory blood and urine testing for employees would not test for alcohol, but would test for the same five (5) drugs as the FRA regulations, cocaine, marijuana, opiates, phencyclidine (PCP), and amphetamines. (53 Fed. Reg. 8374).

prerequisite individualized suspicion whatsoever.[3]

AOPA's interest in this proceeding is based upon the identity of the threshold constitutional questions presented by the FRA regulations at issue and the drug-testing NPRM. The issue of mandatory, randomized testing is not directly raised by the FRA regulations. AOPA is concerned, however, that the Fourth Amendment approach which petitioners have urged the Court to adopt in reviewing post-accident testing, appears intended to establish broad authorization of any form of governmentally-mandated drug testing, without individualized suspicion, including the NPRM's randomized testing provisions.

AOPA is opposed to such intrusive, randomized, agency-imposed testing on an industry-wide scale, particularly since the searches prescribed by both the FRA regulations and the NPRM are not justified by individual cause. On the contrary, their stated intent is to become a tool of administrative expedience, an admitted "deterrent" to hypothecated potential drug abuse industry-wide, of which the FAA's NPRM concedes there is no evidence. (53 Fed.Reg. 8369-8370).

Petitioners herein, including Petitioner Burnley who, in his capacity as Secretary of Transportation has personally chaired public hearings on the FAA's drug-testing NPRM (53 Fed. Reg. 18250), have submitted that this Court should should abandon the "individualized suspicion" prerequisite for all such intrusive bodily searches mandated by agency regulation. AOPA views the NPRM as evidence that such a standard would ultimately eliminate all Fourth Amendment protection

3. The NPRM would require five (5) kinds of testing, 1. pre-employment testing; 2. periodic testing, such as during routine medical examinations; 3. randomized testing as "the primary deterrent method in the anti-drug program;" 4. post-accident testing (analogous to the FRA regulations herein); and 5. testing based on a "reasonable and articulable belief that a[n]...employee is using drugs." (53 Fed. Reg. 8375- 8376).

for every public or private employee within any agency-regulated activity, to be free from the casual use of such deeply and personally intrusive administrative searches.

Acknowledging Justice Scalia's concern with the problems inherent in a "case-by-case" analysis of Fourth Amendment standards,[4] AOPA believes the constitutional questions herein should be reviewed with the understanding that the Fourth Amendment approach adopted will have significant long-term implications upon even more sweeping, less individualized suspicion-based searches, presently under consideration within other agency-regulated industries by the very petitioners herein.

ARGUMENT

ABANDONMENT OF THE INDIVIDUALIZED-SUSPICION PREREQUISITE FOR MANDATORY, AGENCY-IMPOSED DRUG TESTING WOULD EXTINGUISH FOURTH AMENDMENT PROTECTION FOR ANY HOLDER OF A CERTIFICATE OR LICENSE ISSUED BY A GOVERNMENTAL AGENCY.

AOPA believes petitioners have misconstrued the Court's traditional approach to analysis of the Fourth Amendment issues raised by the FRA regulations before the Court. AOPA

4. "[T]his Court has repeatedly acknowledged the difficulties created for the Courts...and citizens by an ad-hoc case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances," *O'Connor v. Ortega*, No. 85-530 (Mar. 31, 1987), 105 S.Ct. 1492, 1505, (Scalia, J., concurring) (objecting to "the formulation of a standard so devoid of content that it produces rather than eliminates uncertainty in this field." *Ibid.*, 105 S.Ct. at 1505).

submits that the Circuit Court correctly concluded, as conceded by petitioners, that the FRA's disputed blood and urine testing regulations are bodily searches, to which Fourth Amendment safeguards apply (Pet. Brief 24).[5] "Although the underlying command of the Fourth Amendment is always that such searches be reasonable, what is reasonable depends on the context within which such a search takes place." *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985).

The Fourth Amendment analysis thus far utilized by this Court in "[d]etermining the reasonableness of any search involves the twofold inquiry: first, one must consider 'whether the...action was justified at its inception,' [citiations]; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" *Ibid*, 469 U.S. at 342-343, *citing, Terry v. Ohio*, 392 U.S. 1, 20 (1968).[6]

The "justified at its inception" prerequisite has further been refined to mean that there must be reasonable grounds for suspecting that the search will turn up evidence of the misconduct in question, *New Jersey v. T.L.O.*, 469 U.S. 325, 342-343 (1985), or for a noninvestigatory purpose "such as to retrieve a needed file." *O'Connor v. Ortega*, No. 85-530 (Mar. 31, 1987), 107 S.Ct. 1492 at 1503.

The Court has opined that it has yet to address the issue of the need for "individualized suspicion" as an essential element

5. 839 F.2d 575 at 580. *Schmerber v. California*, 384 U.S. 757, 767 (1966). *See, also, United States v. Montoya De Hernandez*, 473 U.S. 539 (1985). Petitioners do not seriously contend that the breath and urine testing provisions under Subpart D authorizing such testing are beyond the reach of the Fourth Amendment. As part of a pervasive, federal scheme, there is little doubt the Court of Appeals also correctly determined the FRA regulations, in their entirely, entertain such dominent "state action" as to bring all of the drug-testing provisions thereunder within purview of the Fourth Amendment. 839 F.2d at 580-582, *citing, Lustig v. United States*, 338 U.S. 74, 79 (1949); *United States v. Guest*, 383 U.S. 745, 755-756 (1966).

6. *See, also, O'Connor v. Ortega*, No. 85-530 (Mar. 31, 1987).

of the foregoing reasonableness standard regarding searches of children's handbags by school authorities,[7] or governmental supervisors of their employees' offices.[8] Nonetheless, in each case, it has found such individualized suspicion justifying the search.[9] However, as distinguished from searches of mere personalty, or office furniture in the workplace, the Court has made it clear that "[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such [bodily search] intrusions on the mere chance that the desired evidence might be obtained...[i]n the absence of a *clear indication* that in fact such evidence will be found..." *Schmerber v. California*, 384 U.S. 757, 769-770 (1966).

Thus far, although the Court has authorized such searches without a warrant,[10] the Court has wisely declined to abandon the individualized suspicion prerequisite for warrantless searches of bodily fluids, as now urged by the petitioners. In recently reaffirming that requirement, the Court observed that "the words in *Schmerber* were used to indicate the necessity for particularized suspicion that the evidence might be found within the body of the individual, rather than as enunciating still a third Fourth Amendment threshold between 'reasonable suspicion' and 'probable cause.'" *United States v. Montoya De Hernandez*, 473 U.S. 531, 541 (1985).

Based on the Court's previous interpretation of the "reasonable suspicion" prerequisite for intrusive, warrantless searches of the human body, it would appear that, at worst, the Court of Appeals herein applied the correct Fourth Amendment analysis to the FRA regulations, yet arrived at the wrong

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7. *New Jersey v. T.L.O.*, 469 U.S. 325, 343, (1985), fn. 8.

8. *O'Connor v. Ortega*, No. 85-530 (Mar. 31, 1987), 107 S.Ct. 1492 at 1503.

9. *See, New Jersey v. T.L.O.*, 469 U.S. at 343, (1985), fn. 8; O'Connor v. Ortega, No. 85-530 (Mar. 31, 1987), 107 S.Ct. at 1503.

10. The Court of Appeals correctly concluded "the exigences of testing for the presence of...drugs in blood, urine or breath require prompt action which precludes obtaining a warrant." 839 F.2d at 583; *Schmerber v. California*, 384 U.S. 757, at 770 (1966).

conclusion.

The Court of Appeal's adoption of the two-fold reasonableness test of "justified at its inception" and "reasonably related in scope" is consistent with this Court's well-settled standard of Fourth Amendment review. 839 F.2d at 587. *See, Terry v. Ohio*, 392 U.S. 1, 20 (1968); *New Jersey v. T.L.O.*, 469 U.S. at 341 (1985). The soundness of the Court of Appeal's apparently factual conclusion that "accidents, incident, or rule violations, by themselves, do not create reasonable grounds for [individualized suspicion] of drug impairment" is certainly a more debatable issue.[11]

AOPA finds it interesting that nowhere in petitioners' brief do they discuss the soundness of the Court of Appeal's conclusion that post-accident testing does not give rise to the individualized suspicion required to justify the intrusive bodily searches which drug testing admittedly comprises. This was precisely the Court's reasoning in reversing the Court of Appeals' decision in *United States v. Montoya De Hernandez,*

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11. 839 F.2d at 587. The Court of Appeals concluded that, because accidents alone did not generate reasonable grounds for believing a search would turn up evidence of drug use or abuse, they did not meet the first prong of the reasonableness test, lacking "justification from their inception." *Ibid*, at 587. Arguably, in many jurisdictions, the inherent nature of the type of accident, such as an airplane crash, has been such as to raise a presumption of negligence on the part of the defendant under the traditional doctrine of *res ipsa loquitur. See, generally,* 8 Am.Jur.2d , Aviation, §§ 148, *et seq*. To the extent human factors are always arguably a possible accident cause, the Court of Appeals could just as easily have reasoned that "common-sense conclusio[ns] about human behavoir upon which 'practical people' -- including government officials, are entitled to rely" provide the required suspicion to "justify at their inception" post-accident and post-incident drug-tests. *See, United States v. Montoya De Hernandez,* 473 U.S. at 543 (1985); *New Jersey v. T.L.O.*, 469 U.S. at 346 (1985); *United States v. Cortez*, 449 U.S. 411, 417 (1981).

473 U.S. 531 (1985).[12]

Instead, petitioners have urged the Court to abandon both its traditional, Fourth Amendment two-fold reasonableness analysis, and the particularized suspicion prerequisite for intrusive bodily searches altogether. Petitioners urge the Court to adopt a less structured, and much broader balancing-of-interests analysis, such as that utilized by the Court of Appeals in *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987) *cert. granted*, No. 86-1879 (Feb. 29, 1988) (Pet. Brief 19-24).

Petitioners' newly proposed test would resolve the Fourth Amendment questions raised by governmental drug-testing regulations, essentially by balancing the alleged impairment of the national, public safety against an individual's civil liberties. In sum, petitioners submit the Court should adopt the "administrative search" exception in addressing the Fourth Amendment questions presented by the drug testing regulations in question.

The Court of Appeals wisely declined to do so, observing, *inter alia*, that this Court's previous authority had not extended that doctrine beyond "inspections of property which are not personal in nature." 839 F.2d at 584-586, citing, *Camara v. Municipal Court*, 387 U.S. 523 (1967). AOPA submits that the Court of Appeals ruling on that point was correct and should be upheld.

Petitioners' claim that the Court of Appeals erred in presuming that the searches in question could not be reasonable under the Fourth Amendment absent individualized suspicion, reflects misplaced reliance in part upon this

12. Therein, the Court decided the Fourth Amendment question not by diminishing the boundaries of its protection through abandonment of the particularized suspicion prerequisite for all bodily searches, but by recognizing the Court of Appeals' error in finding such suspicion did not exist, given the experience of the trained customs inspectors and the "commonsense conclusio[n] about human behavoir upon which 'practical people'...are entitled to rely." *Ibid*, at 543.

Court's clearly distinguishable rulings in "border search" cases.[13] Even under the much-relaxed Fourth Amendment standard applied at the international border, this Court has still imposed the *de minimus* requirement of "a particularized and objective basis for suspecting the particular person" of the offense, evidence of which is the object of a personal, bodily search. *See, United States v. Montoya De Hernandez*, 473 U.S. 531, 542-543 (1985).

The balance of petitioners' argument reflects misplaced reliance upon this Court's previous decisions, creating an "administrative search" exception to the Fourth Amendment for statutorily-prescribed, warrantless searches of commercial property within closely regulated industries. (Pet. Brief 23-

13. (Pet. Brief 22) "[S]earches of persons or packages at the national border rest on different considerations and different rules of constitutional law from domestic regulations. The Constitution gives Congress broad comprehensive powers '[t]o regulate Commerce with foreign Nations', Art. I, § 8, cl. 3 [citations omitted].... Consistently, therefore, with Congress' power to protect the Nation by stopping and examining persons entering this country, the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior. Routine searches of the person...are not subject to any requirement of reasonable suspicion, probable cause or a warrant..." *United States v. Montoya De Hernandez*, 473 U.S. 531, 538-539 (1985). Based on that narrow ground, warrantless opening of first-class, international mail is authorized on less than probable cause, *United States v. Ramsey*, 431 U.S. 606, 616-619 (1977); Motorists may be stopped at fixed checkpoints near the border without individualized suspicion, even if based largely on ethnicity, *United States v. Martinez-Fuerte*, 428 U.S. 543, 562- 563 (1976); and vessels on inland waterways accessing international seas may be boarded with no suspicion, *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983).

24).[14] Although this Court yet to apply the "administrative search" exception beyond searches of commercial property as prescribed by statutory (as opposed to regulatory) schemes, the petitioners now urge this Court to do. To bolster that argument, petitioners cite nearly a century of Congressional railroad regulation to demonstrate the railroad worker's significantly diminished expectation of privacy.[15]

In a nutshell, petitioners maintain that the closely and historically pervasive regulated nature of the transportation industry has so diminished the regulatee/employee's expectation of privacy, that his reasonable expectation of freedom from randomized search and seizure of his personal bodily fluids ought be little greater than that of his employer regard-

14. As stated in *United States v. Biswell*, 406 U.S. 311 (1972), "where...regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute." *Ibid*, at 318. "These decisions make it clear that a warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Donovan v. Dewey*, 452 U.S. 594, 601 (1981).

15. Pet. Brief 25-30, *citing, Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir.) cert. denied 479 U.S. 986 (1986) (applying administrative search exception to drug testing for race track employees); *Rushton v. Nebraska Public Power Dist.*, 844 F.2d 562, 566 (8th Cir. 1988) (applying administrative search exception to drug testing of nuclear plant engineers).

ing his commercial property.[16] (Pet. Brief 25-30). Further, petitioners would bootstrap the exception, by asserting their own regulations, adopted under the informal rulemaking process prescribed by the Administrative Procedure Act, 5 U.S.C. §§ 553(b), and without any Congressional participation, have the same legitimate substitute value as a Congressional statute, for Fourth Amendment purposes. AOPA submits that neither contention is tenable.

As opposed to mere commercial property, "even the limited search of a person is a substantial invasion of privacy." *New Jersey v. T.L.O.*, 469 U.S. at 338 (1985). In recently discussing the reasonableness of the employee's expectation in the workplace, the Court made an important observation:

> "Not everything that passes through the confines of the business address can be considered part of the workplace context, however....[e.g.,] closed luggage...a handbag, or briefcase each workday. While whatever expectation of privacy the employee has in the existence and outward appearance of the luggage is affected by its presence in the workplace, the employee's expectation of privacy in the *contents* of the luggage is not affected the same way. The appropriate standard for a workplace search does not necessarily apply to a piece of closed personal luggage, a handbag or a briefcase that happens to be within an employer's business address." *O'Connor v. Ortega*,

16. *See, Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor dealer's minimal expectation of privacy regarding nonforcable federal inspection of locked storeroom); *United States v. Biswell*, 406 U.S. 311 (1972) (firearms dealer's minimal expectation of privacy regarding federal inspection of his locked storeroom during business hours under Gun Control Act); *Donovan v. Dewey*, 452 U.S. 594 (1981) (mine operator's minimal expectation of privacy regarding federal inspection of its quarries under Mine Safety and Health Act).

No. 85-530 (Mar. 31, 1987) 105 S.Ct. 1492 at 1497.

The Court in *O'Connor v. Ortega* rejected the assertions of the petitioners therein, mirrored by those of petitioners herein, that employees have no reasonable expectation of privacy in the workplace. The Court recognized and declared such a right with regard to an employee's desk and file cabinets, and again required individualized suspicion as a constitution-al prerequisite for any search of such areas of the workplace. *O'Connor v. Ortega*, No. 85-530 (Mar. 31, 1987), 105 S.Ct 1492 at 1498-1503. That the employee has a considerably greater objective expectation of privacy in his body and bodily fluids than in his desk and file cabinets is not an unreasonable notion.

While this court has held that, within certain limited contexts, individuals such as prisoners have no legitimate expectation of privacy, *Ingraham v. Wright,* 430 U.S. 651 (1977), the Court observed in *T.L.O.*, "we are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment." *New Jersey v. T.L.O.,* 469 U.S. 325, 339-340 (1985).

Unless the Court is now prepared to equate commercially-employed transportation personnel with convicted prisoners for Fourth Amendment purposes, as petitioners herein effectively would argue, petitioner's suggestion that the "administrative search" doctrine rationalizes the constitutionality of the FRA regulations at issue must be rejected.

Moreover, the regulatory statutes prescribing commercial property inspections carefully crafted by Congress, such as the Gun Control Act in *United States v. Biswell,* 406 U.S. 311 (1972), and the Mine Safety and Health Act in *Donovan v. Dewey,* 452 U.S. 594 (1981), constitute far different and more persuasive authority than the ad hoc regulations which virtually any federal agency, including those headed by petitioners herein, can informally impose under the Administrative Procedure Act with minimal notice and comment. *See,* 5 U.S.C. §§ 553(b), *et seq.*

AOPA submits that, were this Court to apply the "administrative search" exception to mandatory randomized drug testing prescribed by informally-adopted agency regulation, as petitioners herein have urged, virtually no Fourth Amendment protection would remain for any public or private employee within any agency-regulated activity. Such is particularly true in light of the substantial unfettered discretion and lack of constitutional safeguards associated with easily, casually, and unilaterally-promulgated agency regulations, concerning potentially any facet of the regulated environment. 5 U.S.C. §§ 553(b), *et seq.* The resulting potential for the well-intentioned, but expeditious agency abuse of important constitutional safeguards, based on any momentary but articulable policy goal, is manifest.

The very FAA NPRM cited by AOPA demonstrates how easily and with what little opportunity for full participation and comment, an agency such as the FAA or Department of Transportation can impose such sweeping regulations on potentially hundreds of thousand of Americans. Once this "Pandora's Box" is opened, there is no turning back. Much to its dismay, AOPA believes the mandatory, randomized drug testing provisions of the FAA's NPRM may be just the beginning, unless the Court herein acts to recognize and preserve the "individualized suspicion" prerequisite as the very essence of Fourth Amendment integrity.

Petitioners' suggestion that the "individualized suspicion" prerequisite be abandoned thus appears highly unwise. It would also appear to be totally unnecessary. AOPA believes the better view, in our modern transportation industry, is that an accident or incident of the type delineated within the FRA regulations, provides more than adequate suspicion of contribution by human factors, to meet to Fourth Amendment's "individualized suspicion" requirement for such intrusive, bodily searches. *See, United States v. Montoya De Hernandez,* 473 U.S. 531, 542-543 (1985).

CONCLUSION

In the more than 50 years in which it has been an integral part of the transportation safety dialogue, AOPA has witnessed the increasingly indiscriminate use of the "safety demands it" rationalization for virtually any regulatory proclamation, regardless of the proposed action's likelihood ever to address the targeted problem. Once again, petitioners have herein wielded the mammoth bludgeon of the public safety and morality, as the essential justification for these individually suspicionless, yet unprecedentedly intrusive invasions, of our most deeply-cherished notions of personal privacy. As Justice Brennan has so wisely observed:

> If there is one enduring lesson in the struggle to balance individual rights against society's need to defend itself against lawlessness, it is that "[i]t is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly at the end." *United States v. Montoya De Hernandez*, 473 U.S. 531, 567 (1985) (Brennan, J., dissenting), *citing Davis v. United States,* 328 U.S. at 597 (1946) (Frankfurter, J., dissenting).

Moved by whatever momentary evil has aroused their fears, officials -- perhaps even supported by a majority of citizens -- may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil. But the Fourth Amendment rests on the principle that a true balance between the individual and society depends on the recognition of 'the right to be let alone -- the most comprehensive of rights and the

> right most valued by civilized men.' *New Jersey v. T.L.O.*, 469 U.S. 325, 362-363 (1985) (Brennan, J., dissenting) *citing, Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

If the Fourth Amendment is to retain its significance and vitality within a free and civilized society, adoption of the "administrative search" exception for agency-promulgated drug testing represents a line which, as Justice Brennan has warned, we simply cannot afford to cross. Clearly, the Fourth Amendment was never intended to be held hostage, and all rights thereunder forfeited, as a *quid pro quo* for the commercial exercise of one's privileges under a certificate or license issued by an agency of the United States government.

Respectfully Submitted,

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